IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 15, 2008 Session

IN THE MATTER OF: WILLIAM A. APPLETON, JR., v. THE CIVIL SERVICE BOARD OF THE METROPOLITAN PUBLIC HEALTH DEPARTMENT OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

Direct Appeal from the Chancery Court for Davidson County, Part IV
No. 06-1271-IV Hon. Richard H. Dinkins, Chancellor

No. M2007-01062-COA-R3-CV - Filed August 5, 2008

The Department found appellant had violated the Board of Health's Civil Service Rules, and discharged him from his employment. The Administrative Law Judge affirmed his dismissal. On petition to the Chancery Court, the Chancellor upheld the Department's discharge of appellant. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Mark C. Scruggs, Nashville, Tennessee, for Appellant, William A. Appleton, Jr.

The Department of Law of the Metropolitan Government of Nashville and Davidson County, Sue B. Cain, Director of Law, and J. Brooks Fox and Elizabeth A. Sanders, Assistant Metropolitan Attorneys, Nashville, Tennessee, for Appellee, The Metropolitan Government of Nashville and Davidson County, Tennessee.

OPINION

On April 11, 2005 the Director of the Metropolitan Health Department of the City

of Nashville, terminated appellant plaintiff from his employment. Appellant timely requested appellate review and the Director of the Department upheld appellant's termination. Appellant was found to have violated:

Chapter 6, §6.1 of the Board of Health's Civil Service Rules:

> An employee of the Department shall not engage in any criminal, dishonest, infamous, immoral, or disgraceful conduct or behavior, activity or association which discredits himself or the department.

Chapter 6, ¶6.5B of the Board of Health's Civil Service Rules provides the following grounds for disciplinary action:

> 27. The use or threat of violence or intimidation.
> 30. Any failure of good behavior which reflects discredit upon himself, the department and/or the Metropolitan Government.
> 31. Conduct unbecoming an employee of the Metropolitan Government.

The Board of Health, as was its policy, requested the appointment of an Administrative Law Judge to hear the appeal and to submit a proposed Findings of Fact and Conclusions of Law to the Board.

The hearing was held on September 7, 2005 and October 10, 2005 before the Administrative Law Judge. The ALJ's findings of fact are consistent with the evidence presented at the hearing, which we summarize:

1. Mr. Appleton, an Environmentalist I with the Metropolitan Public Health Department in the Bureau of Environmental Health Services, shared office space with five other Environmentalists. The Environmentalists spent much of the day in the field and typically were in the office doing paper work at the beginning and end of the day.

2. On January 1, 2005 Jawon Lauderdale began working as an Environmentalists I and shared office space with Mr. Appleton and the other Environmentalists. At that time Mr. Appleton had worked with the Department for three years. Mr. Lauderdale and Mr. Appleton did not get along and Mr. Appleton made it clear to others that he did not like Mr. Lauderdale and he informed one co-worker that he wanted to fight Mr. Lauderdale. Mr. Appleton reported various infractions he believed Mr. Lauderdale had committed to their supervisor. The two men, who sat next to each other, bickered and intentionally annoyed each other.

3. The situation worsened on February 18, 2005 when the two men were

working together in the office. Mr. Lauderdale was playing music on his computer and Mr. Appleton, who claimed he was making telephone calls, asked him to turn the volume down. Mr. Appleton claimed that his co-worker did not lower the volume and he left the room and made a complaint to the supervisor. When the supervisor did not take immediate action, Mr. Appleton returned to his office and pulled the speaker wire from Mr. Lauderdale's computer. Mr. Appleton was given a written reprimand and his desk was moved across the room from Mr. Lauderdale's desk. Mr. Appleton refused to sign the reprimand form as he did not believe that he was at fault.

4. The incident that led to Mr. Appleton's termination occurred on April 5, 2005. The two men were alone in the office and they exchanged words which led to a fight breaking out. There were no witnesses to the fight and only Mr. Appleton and Mr. Lauderdale testified at the hearing regarding the occurrence. Both men denied causing the fight and throwing the first punch. Both men placed total blame on the other and stated that they only fought to defend themselves. The fight was very brief and was broken up by several co-workers who entered the office after hearing noise from the fight. Mr. Lauderdale was found sitting on top of Mr. Appleton.

5. It was impossible to say who started the fight. Although the ALJ stated that the physical evidence suggested that Mr. Lauderdale started the fight, he reiterated that the evidence did not " necessarily prove" that Mr. Lauderdale started the fight." Importantly, the ALJ concluded that "[w]hat is most evident from all of the evidence is that neither man did anything to ease the tensions between them and that whoever physically started the fight, the other's words and actions most likely contributed directly to it happening."

6. Mr. Lauderdale, a new employee was still on probation when the fight occurred. As a result of the fight, his probationary period was extended for two more months. Mr. Appleton was deemed to be the aggressor in the situation by Dr. Bailey and his employment was terminated. The reason he was terminated was that he had been disciplined, counseled and reprimanded on two other occasions regarding the need to control his temper, once in 2003 and once a few months prior to the fight in connection with the incident with Mr. Lauderdale playing music on his computer in the office. Additionally, Mr. Appleton's supervisors believed he was responsible for the fight.

The ALJ's Initial Order on February 23, 2006 stated as follows:

1. The Health Department proved by a preponderance of the evidence that Mr. Appleton violated all of the sections of Chapter 6, Section 6.5.

2. The Department did not prove that Mr. Appleton struck the first blow in the subject fight. The proof suggests that Mr. Lauderdale struck the first blow. However, even if that is true, Mr. Appleton did not have to continue to fight and he could have reported Mr. Lauderdale's conduct to his supervisors.

3. The conduct of both Mr. Appleton and Mr. Lauderdale is "reprehensible" as neither man did anything to ease the tension between them and the man who did not strike the first blow still contributed directly to the occurrence of the fight with his words and actions. The only significant difference between the situation of the two men is that Mr. Appleton's past conduct had caused him to receive two written warnings advising him to control his temper and he had been made to attend an anger management course.

4. The termination of Mr. Appleton was appropriate. "While progressive discipline might call for a suspension for other types of disciplinary offences, Mr. Appleton's conduct constitutes a safety risk for the public and his fellow employees and a possible liability for the Metropolitan Government. Mr. Appleton had ample warning that his conduct would not be tolerated and has disregarded it.

The Board upheld and adopted the Order entered by the ALJ and appellant filed a Petition for Judicial Review pursuant to Tenn. Code. Ann. § 4-5-322 in the Chancery Court for Davidson County.

The Trial Judge affirmed the decision of the Board on April 18, 2007, and adopted the ALJ's Findings of Fact which were not disputed by either party. The Trial Judge stated that appellant's primary complaint was that he "was not shown to be the aggressor in the fight with Mr. Lauderdale, and as a consequence, was entitled to defend himself against the attack" as he had no legal duty to retreat from attack and his actions of self-defense were not in violation of the rule. Applying the facts as found by the ALJ to the applicable civil service rule that proscribes "use of violence, failure of good behavior and conduct unbecoming an employee", the Court concluded that the Board did not act arbitrarily, capriciously or without any course of reason or exhibited a clear error of judgment in considering the specific facts of the incident as well as petitioner's employment history" in terminating his employment.

On appeal, the appellant raises these issues:

A. Does an employee's right to self preservation supercede an employer's right to dictate conduct in the work place?

B. Was the Trial Court correct when it affirmed the Metropolitan Board of Health's decision based on a finding that the Administrative Law Judge's findings of fact and conclusions of law were not arbitrary or capricious?

The Tennessee Supreme Court discussed the scope of review of the actions of a civil service board in *Watts v. Civil Service Bd. for Columbia,* 606 S.W.2d 274 (Tenn. 1980):

> "[T]he scope of court review of the action by the Civil Service Board is that afforded by the common law writ of certiorari" pursuant to Tenn. Code Ann. § 27-9-114. In such actions the reviewing court is limited to inquiry as to whether the administrative agency acted fraudulently, illegally or arbitrarily. *Hoover Motor Express Company v. Railroad and Public Utilities Commission*, 195 Tenn. 593, 261 S.W.2d 233 (1953). Under the common law writ of certiorari, questions of law only will be reviewed by the courts. An action of an administrative agency which is not supported by any evidence is arbitrary and void and may be quashed on common law writ of certiorari. Whether or not there is any material evidence to support the action of the agency is a question of law to be decided by the reviewing court upon an examination of the evidence introduced before the agency**....** In the trial court, under the common law writ, reversal or modification of the action of the Civil Service Board may be had only when the trial court finds that the Board has acted in violation of constitutional or statutory provisions or in excess of its own statutory authority; has followed unlawful procedure or been guilty of arbitrary or capricious action; or has acted without material evidence to support its decision. The trial court does not weigh the evidence. The scope of review by the appellate courts is no broader or more comprehensive than that of the trial court with respect to evidence presented before the Board.

Watts at 276 - 277.

Consequently, this Court's scope of review in this case "is no broader or more comprehensive than that of the trial court with respect to evidence presented before the [b]oard." *Watts,* 606 S.W.2d at 277.

Appellant does not challenge the fact finding of the ALJ or the Trial Court's acceptance of the ALJ's findings of fact. We note at the outset that appellant did not address on appeal the ALJ's finding that "[t]he conduct of both Mr. Appleton and Mr. Lauderdale is 'reprehensible' as neither man did anything to ease the tension between them and the man who did not strike the first blow still contributed directly to the occurrence of the fight with his words and actions." Appellant argues that under the law, once he was attacked he had no duty to retreat and report Lauderdale's aggressive behavior to their supervisors, and cites to the Tennessee Practice Series Pattern Jury Instructions, T.P.I - Civil 8.07 Self Defense which states: "A person who is unlawfully attacked or who reasonably fears an unlawful attack may use as much force in self-defense as reasonably appears necessary." Appellant relies on a West Virginia case, *Feliciano v. 7-Eleven, Inc.*, 210 W.Va. 740, 749-750, 559 S.E.2d 713, 722-723 (W.Va. 2001) to support his argument. In that case the Supreme Court of West Virginia held that "when an at will employee has been discharged from his/her employment based upon his/ her exercise of self-defense in response

to lethal imminent danger, such right of self-defense constitutes a substantial public policy exception to the at will employment doctrine and will sustain a cause of action for wrongful discharge." *Id.* at 722-723. That case is distinguishable from the case before us, in that appellant never testified that he was in fear of his life before or during the altercation, nor was appellant an employee at will.

Tennessee Courts have not addressed the issue addressed in *Feliciano*, i.e., whether a right of self-defense provides a public policy exception to the at will employment doctrine or to termination under the Civil Service Rules. However, we do not have to consider this issue because the ALJ stated that it was impossible to say who started the fight and laid blame for the fight on both parties. The ALJ's observation regarding appellant's option to retreat from the fight, which is the only subject addressed by appellant on appeal, is superfluous as its was preceded by the ALJ's comment that "even if that is true"[that Mr. Lauderdale struck the first blow]. The remark regarding the option of retreat was predicated on a finding that Mr. Lauderdale did throw the first blow, a finding that the ALJ never made. In fact, as we have already observed, the ALJ stated that it was impossible to say who started the fight.

The Trial Court did not err when, after applying the facts as found by the ALJ to the applicable civil service rule, he concluded that the Board did not act arbitrarily, capriciously or without any course of reason or exhibited a clear error of judgment in considering the specific facts of the incident as well as Petitioner's employment history in terminating his employment.

We conclude there is substantial material evidence to uphold the Trial Court's Judgment, which we affirm. The cause is remanded with the cost of the appeal assessed to William A. Appleton, Jr.

HERSCHEL PICKENS FRANKS, P.J.